CHEOK SWEE LEE & ORS

v.

LOO CHOO TENG & ORS

HIGH COURT MALAYA, PULAU PINANG
JEFFREY TAN J
[CIVIL SUIT NO: 8 OF 1981]
9 SEPTEMBER 1997

CONTRACT: *Breach - Specific performance - Contract provided for specific performance - Whether plaintiffs entitled - Whether plaintiffs could renounce benefit or waive "fee simple" for "fee" subject to acquisition*

CONTRACT: *Terms - Construction - Whether construction of term providing for termination correctly construed - Whether true intention of parties provided in contract - Whether intention dependent upon acquisition*

CIVIL PROCEDURE: *Pleadings - Waiver - Whether waiver must be especially pleaded - Whether plaintiff had right of waiver*

CONTRACT: *Construction - Intention of parties - Whether contract should be construed to give effect to intention of parties - Whether to use objective approach - Whether to interpret terms as conditions precedent or subsequent*

LAND LAW: *Acquisition of land - Intended acquisition by state government - Whether without release of intended acquisition an agreement will be valid - Whether purchaser can waive condition on intended acquisition - Whether purchaser can complete sale*

The plaintiffs and the defendants had entered into an agreement for the sale and purchase of four lots of land, all of which were the subject of intended acquisition by the state government. It was provided in the agreement that the defendants were to obtain a release from the state government, and if the release was not obtained within two years of the date of the contract, the agreement would be null and void. During that period, the defendants had applied to the Collector of Land Revenue for the release of the intended acquisition and the latter wrote back informing the former that action was being taken to withdraw the acquisition, except for 0.2151 acres, which was to be acquired. However, the Collector later wrote to the defendants to inform them that their application for the release of the intended acquisition was still under consideration. The plaintiffs then wrote to the defendants saying that they intended to go ahead with the purchase notwithstanding the acquisition by the state government, and asked that the documents of title be sent to them.

When the defendants did not comply, the plaintiffs filed a writ asking for specific performance. It was submitted, that as the acquisition was not released within two years after the date of the agreement, the defendants were relieved from the full force of the agreement, pursuant to cls. 3 and 5 of the agreement. The plaintiffs contended that the primary question was the construction of the agreement and the only issue was whether the plaintiffs were entitled to specific performance.

Held:

[1] The intent of the parties, from the construction of the entire agreement involving the ascertainment of the words used, and the legal effect of those words, was an exchange of land for money and *vice versa*. The parties agreed to that exchange, but that exchange was impeded by the intended acquisition, as there could not be an exchange if the land was compulsorily acquired. If the intended acquisition was out of the way, there could be an exchange.

[1a] In the light of the surrounding circumstances of the case, and adopting an objective approach to the construction of the contract, cl. 3 could not be construed as a condition precedent or subsequent, as that would be a construction permitting the defendant to abort the sale even if the land was released from acquisition, just by not applying for formal consent. Clause 3(e) read together with cl. 5 must be construed as a performance covenant, *videlicet*, the defendants to apply for formal consent, the plaintiffs to pay the balance of the purchase price, and the defendants to execute all deeds transferring a good and registrable title to the plaintiffs.

[1b] The term in the agreement that the said land would be free of encumbrances and cl. (3a) of the agreement were for the exclusive benefit of the plaintiffs, and so they had a right in the absence of an express prohibition to waive the condition, on the withdrawal of the acquisition proceedings.

[2] The plaintiffs had renounced, and in that sense had "waived" the contractual term on the land being free of encumbrances when they pleaded in their statement of claim that they required the defendants to complete the sale.

[2a] That the waiver was not specifically pleaded could not be an issue, as notice was given both in the statement of claim and in the bundles, that they required the defendants to complete the sale.

[3] The canons of construction are no more than pointers to discovering the presumed intention of the parties to a written contract. The construction, that the defendants could not refuse the conveyance which was subject to acquisition as they would be paid in full, would be a just and reasonable result as it would not have mattered to the defendants whether the plaintiffs suffered loss. But to construct that the conveyance subject to acquisition should be refused even if the purchase price would be paid in full, would not be a reasonable result and neither would it be a construction upholding the transaction.

Obiter dicta

[1] A liberal construction should be put upon written instruments so as to uphold them if possible and carry into effect the intention of the parties.

[2] Where a contract is couched in unambiguous language, the court must give effect to it. But where the terms of a contract are ambiguous then the court may imply a term in order to uphold the transaction.

[Specific performance granted.]

Cases referred to:

National Land Finance Co-operative v. Sharidal [1983] 2 MLJ 211 ***(refd)***
Aberfoyle Plantations Ltd v. Khaw Bian Cheng [1960] 26 MLJ 47 ***(refd)***
Jaafar bin Ibrahim v. Gan Kim Kin [1985] 2 MLJ 24 ***(refd)***
Chatenay v. The Brazilian Submarine Telegraph Co Ltd [1982] 1 QB 79 ***(cit)***
Pioneer Shipping Lyd v. BTP Tioxide Ltd [1982] AC 724 ***(refd)***
Great Western Railway v. Bristol Corpn [1918] 87 LJ Ch 414 ***(refd)***
Re Jodrell [1890] 44 Ch 590 ***(refd)***
Leader v. Duffy [1888] 13 App Cas 294 ***(refd)***
Smith v. Cooke [1891] AC 297 ***(refd)***
SpA v. Tradax Ocean Transportation [1987] All ER 81 ***(refd)***
Equity & Law Life Assurance Society plc v. Bodfield Ltd [1987] 281 EG 1448 ***(refd)***
Reardon-Smith Line Ltd v. Ynquar Hansen-Tangen [1976] 1 WLR 989 ***(refd)***
Kam Mah Theatre Sdn Bhd [1994] 1 CLJ 1 ***(cit)***
Ipswich Diocesan Board of Finance v. Clark (No 2) [1975] 1 WLR 468 ***(refd)***
James Miller and Partners Ltd v. Whitworth Street Estates (Manchester) Ltd [1970] AC 583 ***(cit)***
Grey v. Pearson [1857] 6 HL Cas 61 ***(cit)***
Robertson v. French [1803] 4 East 130 ***(cit)***
Aspdin v. Austin [1844] 5 QB 671 ***(cit)***
Luxor (Eastborne) Ltd v. Cooper [1941] AC 108 ***(refd)***
Churchward v. R [1865] LR 1 QB 173 ***(cit)***
Duke of Westminister v. Guild [1985] QB 688 ***(cit)***
BP Refinery (Westernport) Pty Ltd v. Shire of Hastings [1978] 52 AJLR 20 ***(refd)***
Datuk Yap Pak Keong v. Sababumi (Sandakan) Sdn Bhd. [1997] 1 CLJ 23 ***(refd)***
Stirling v. Maitland [1864] 5 B & S 841 ***(refd)***

Mackay v. Dick [1881] 6 App Cas 251 ***(refd)***
Hudson v. Buck [1877] 7 Ch D 683 ***(cit)***
Chamber Colliery Ltd v. Twyerould (1893) [1915] 1 Ch 268 ***(cit)***
Re Strand Music Hall Co Ltd [1865] 35 Beav 153 ***(cit)***
SA Maritime et Commerciale of Geneva v. Anglo-Iranian Oil Co Ltd [1954] 1 WLR 492 ***(cit)***
Government of the Federation of Malaya v. Surinder Singh Kanda [1961] MLJ 121 ***(refd)***
Wickman Machine Tool Sales Ltd v. Schuler (L) AG [1970] 1 WLR 840 ***(refd)***
Wood Preservation Ltd v. Prior [1969] 1 WLR 1077 ***(refd)***
Trans Trust SPRL v. Danubian Trading Co Ltd [1952] 2 QB 297 ***(refd)***
Bentworth Finance Lubert [1968] 1 QB 680 ***(refd)***
Pym v. Campbell [1856] 6 E & B 370 ***(refd)***
Bettini v. Gye [1876] 1 QBD 183 ***(cit)***
Glaholm v. Hays [1841] 2 M & G 257 ***(cit)***
London Guarantee Co v. Fearnley [1880] 5 App Cas 911 ***(cit)***
Schuler (L) AG v. Wickman Machine Tool Sales Ltd [1974] AC 235 ***(cit)***
Smallman v. Smallman [1971] 3 All ER 717 ***(refd)***
Rede v. Farr [1817] 6 M & S 121 ***(refd)***
New Zealand Shipping Co v. Societe des Ateliers et Chantiers de France [1919] AC 1 ***(refd)***
Sandra Investments Proprietary Limited v. Booth [1983] 153 CLR (HCA) ***(refd)***
Lancelot St Elmo Balbosa v. Ayoub Ali [1990] 1 WLR 914 ***(refd)***
Graham v. Pitkin [1992] 64 P & C R 522 ***(refd)***

Legislation referred to:
Town and Country Planning Act 1960, ss. 2(1), 8(1)

Other sources referred to:
The Concise Oxford Dictionary of Current English, 9th edn
Black's Law Dictionary, 6th edn
Broom's Legal Maxims, 10th edn
The Sale and Purchase Of Real Properties in Malaysia, Visu Sinadurai
The Interpretation of Contracts, Lewison, p 23

For the plaintiffs - RR Sethu (R Rajasingam with him); M/s R Rajasingam & Co
For the 1st & 2nd defendants - Ronesh Abraham (Geetha Sivapathasundram with him); M/s Shook Lin & Bok
For the 4th defendant - Ong Keng Leong; M/s Ghazi & Lim

JUDGMENT

Jeffrey Tan J:

This is an action for: (a) specific performance of an agreement (agreement) dated 8 January 1979 between the 1st defendant and Ong Thai Hong, the trustees of the Estate of Ong Joo Sun (deceased), as vendors of land held under Holding No. 532 Mukim 12, South West District, Penang (hereinafter referred

to as the said land) of the one part, and the plaintiffs, as purchasers of the said land of the other part, (b) "an order approving the sale of the said land in accordance with the terms of the said agreement", but abandoned at the stage of submissions, (c) "damages in lieu or in addition to specific performance", (d) further or other relief, and, (e) costs. The action against the 3rd defendant was discontinued on 7 April 1986.

The 1st and 2nd defendants' pleaded defence, quintessentially, is that the land was the subject of acquisition and the agreement of sale became null and void, pursuant to the provisions of the agreement, when the acquisition was not withdrawn within two years from the date of execution of the agreement. As for the 4th defendant, he was added as a party, on his application, to the proceedings. The 4th defendant's pleaded defence, having abandoned and then reclaimed his amended defence in the course of the trial, is that the 1st defendant and Ong Thai Hong had no authority to enter into the agreement and that the land was the subject of acquisition.

Trial commenced on 5 June 1997. Placed before the court were five bundles of documents – PB1, PB2 and PB3 from the plaintiffs, DB1 from the 1st and 2nd defendants, and DB2 from the 4th defendant. There was no statement of agreed facts and no agreed bundle of documents. However, by consent, formal proof of all documents in those five bundles was dispensed; the content of all documents in the five bundles was admitted save the content in the following documents – PB1 (11, 15, 21, 22, 35, 37, 41, 50, 53-55, 57); PB3 (3, 5, 7, 12-14, 16-18, 25); DB2 (21-45). Accordingly, there is a set of agreed documents – with the wholesale dispensation of formal proof and the total acceptance of the content of the documents not expressly excluded – on content and the dispensation of formal proof.

With regard to the land, the following is not in dispute:

(a) the 1st and 4th defendants, as trustees, were and still are the registered proprietors of the land,

(b) On 25 April 1974, the Penang State Government declared its intention, by gazette notification No. 103/74 (GN 103/74), to acquire the whole of the land under the Land Acquisition Act 1960,

(c) on 20 December 1979, the Penang State Government declared its intention, by gazette notification No. 884/79 (GN 884/79), to acquire 9,369 square feet of the land under the Land Acquisition Act 1960,

(d) on 11 October 1980, and pursuant to GN 884/79, the Penang State Government acquired 9,369 square feet of the said land,

(e) on 22 September 1984, the Penang State Government withdrew from the intended acquisition under GN 103/74.

(f) further to the aforesaid acquisition of 9,369 square feet, the land was subdivided into 4 lots – lots 2347, 2348, 2349 & 2350.

The other undisputed facts or facts not in dispute, from the agreed documents and from the testimony of the witnesses, are as follows.

By the agreement dated 8 January 1979 – PB1(3-7) (agreement), the 1st defendant and one Ong Thai Hong (by his attorney, the 2nd defendant), the trustees of the Estate of Ong Joo Sun (Estate), agreed to sell and the plaintiffs agreed to buy the whole of the said land, measuring 42.9688 acres, at the agreed price of RM1.60 per square foot. There was a notification [GN 103/74 – PB1(1-2)] by the Penang State Government in the Penang State Government Gazette of 25 April 1974 that the whole of the said land would be compulsorily acquired for a public purpose/s. The agreement stipulated that the trustees "will sell" and the plaintiffs "will buy" the said land "subject ... the property being released by the State Government from the restriction as published in the Government of Penang Gazette notification No. 9/74 and all other Government restrictions whatsoever" (cl. 1 of the agreement). It should be pointed out though, that the relevant gazette was GN 103/74 and not 9/74.

On GN 103/74, the agreement provided as follows:

> 3rd Preamble
>
> And Whereas by Government of Penang Gazette No. 9 *(sic)* dated the 25th April, 1974, the land in question namely Lot 532 Mukim 12 South West District, Penang was acquired by the Penang State Government for the following purpose: public, industrial, residential, commercial and agricultural purposes to wit for land development and utilisation, resettlement of squatters, housing, institutional and recreational amenities in relation to integrated urban development and matters connected therewith; but to date the Penang State Government has not taken possession of the said land nor has it compensated the Estate of Ong Joo Sun, in any way whatsoever.
>
> Clause 3
>
> The purchase shall be subject to:
>
> (a) The property being released by the Penang State Government;
>
> (b) The Trustees deducing a good and marketable title to the property sold;
>
> (c) The property sold to be free from all encumbrances whatsoever;
>
> (d) without vacant possession;

(e) Completion of the purchase to be within 6 months from the date of court Order sanctioning the sale by the Trustees.

Clause 5

If for whatsoever reasons the Penang State Government refused to release the said property from the restrictions imposed under the Land Acquisition Act 1960 to the Estate of Ong Joo Sun, deceased within two (2) years from the date hereof, this agreement, notwithstanding cl. one (1) to three (3) aforesaid, shall be null and void.

The agreement provided for the withdrawal of GN 103/74 and the court's sanction for the sale:

Clause 7

The trustees shall apply to the Penang State Government for the release of the said property back to the Estate of Ong Joo Sun, deceased for sale to the purchasers.

Clause 8

The trustees shall also apply to court for a formal sanction to sell the property in accordance with the Probate and Administration Ordinance 1959.

The agreement furthermore stipulated; (i) the deposit shall be immediately refunded to the purchasers in the event that the land is not released "from the restrictions of the Land Acquisition Act 1960" (cl. 6), (ii) "time shall be of essence of the contract" (see cl. 13), (iii) "the purchasers shall be entitled to specific performance of the contract" (cl. 15), and, (iv) the forfeiture of the deposit in the event that the purchasers should fail to complete the purchase (cl. 16) (the plaintiffs paid the deposit of RM150,000 on 12 December 1978).

Two days after the execution of the agreement, Messrs Syarikat Goh Guan Ho (GGH), solicitors for the trustees of the Estate, notified the Collector of Land Revenue, Balik Pulau, by letter dated 10 January 1979 (PB1(8-9)), that the trustees, on 8 January 1979, had entered into an agreement of sale of the said land at RM1.60 per square foot; forwarding a copy of the agreement, GGH applied to the Collector to acquire "forthwith" or otherwise release the said land from gazette 9/74, as the Estate was facing financial hardship. That application was followed by GGH's reminder (PB1(10)). On 1 March 1979, GGH informed the beneficiaries of the Estate that the trustees had entered into a "firm agreement to sell" the said land to the 1st plaintiff and others, that the purchasers had paid a deposit, and that an application had been made to the State for the release of the said land from "s. 8". In that letter, PB1(12-13), GGH expressed the following comment, "it is uncertain whether this will be allowed". On 2 April 1979, GGH wrote to the Collector and enquired on

the outcome of the Collector's letter of 20 February 1979 to the Director of Lands & Mines, Penang. By letter dated 25 April 1979 PB1(16), and replying to the Collector's letter of 9 April 1979, GGH protested that the situation, where the land was under the restrictions of s. 8 for five long years without any completion of the intended acquisition and where the Estate was prevented from dealing with the land but compelled nonetheless to pay the quit rents, was untenable; GGH restated the stand in PB1(10) and informed the Collector that the Estate had no money to pay the "quit rents and other outgoings".

Meanwhile, on 4 June 1979, Messrs Khaw Ewe Seng & Co. (KES), solicitors then for the plaintiffs, enquired from GGH on the progress of the application for the release of the said land from GN 103/74. GGH replied that there was none, save for routine correspondence "with the object of trying to get them to make up their mind as to whether they will acquire the land or release it". On 19 June 1979 and 1 November 1979, GGH reminded the Collector that its (GGH) letter of 25 April 1979 (PB1(16)) was unanswered. On 21 January 1980, GGH notified Messrs Lim Cheng Chuan & Co., solicitors, that they (GGH) had been instructed to commence proceedings against the State Government for the release of the land from GN 103/74. GGH requested for the land titles from LCC. LCC replied that the land titles were not with them.

On 17 February 1980, pursuant to GN 884/79, the Collector issued a notice (PB1(25-26)) of an inquiry on 18 March 1980 to acquire 9,369 square feet of the land. GGH enquired "whether and when the balance of the land not acquired will be released to enable us (GGH) to proceed with an order of court for the sale of the land in accordance with the agreement signed by our clients and dated 8 January 1979". In the same letter, GGH also requested for a copy of the plan "before the 18th instant, showing the portion to be acquired." On 13 March 1980, the Collector informed GGH that a copy of the plan showing the portion to be acquired could be collected from his (Collector) office. The Collector also informed GGH that he had not received any instruction from the state authority on the balance of the said land.

On 11 June 1980, GGH acknowledged the receipt of the Collector's letter dated 9 January 1980 and requested the Collector "to keep us (GGH) informed of the date of withdrawal of the Government Gazette 103 dated 25 April 1974". On 17 June 1980, GGH informed the 1st and 2nd defendants that they had received a letter from the Department of Lands & Mines, South West District, Penang that the government would be acquiring 0.2151 acres under GN 884/79 and that action "is being taken to cancel notification 103/74 which will be published soon."

On 3 September 1980 and 13 September 1980, GGH reminded the Collector of his letters of 11 June 1980 and 19 June 1980 and enquired once more on the status of the said land. On 11 October 1980, Form K under s. 23 of the Land Acquisition Act 1960 was issued and 9,369 square feet of the said land was acquired. On 5 November 1980, notice was issued that an inquiry would be held on 29 November 1980 to acquire the whole of the said land. On 27 November 1980, GGH applied for an adjournment of that inquiry.

On 28 November 1980 – PB1(46), Messrs R Rajasingam & Co. solicitors for the plaintiffs, objected to the Collector on the inquiry on 29 November 1980 as it was communicated to GGH that the land would not be acquired. On 2 December 1980, GGH forwarded RR's letter of 28 November 1980 to the 1st and 2nd defendants; in that letter GGH informed the 1st and 2nd defendants that they (GGH) could not say if the facts asserted by RR were correct.

On 11 December 1980, GGH wrote the following letter to RR – PB1(51):

> Date: 11th Dec. 1980
>
> M/s. R. Rajasingam & Company,
>
> Dear Sirs,
>
> Re: Agreement dated 8.1.79 in respect of Lot 532, Mk. 12, S.W.D. Penang
>
> We refer to your letter dated 8th instant on which we have taken our clients' instructions to say that it is their intention to stick to the letter of the Agreement, no more no less. They are of the opinion that your clients are in good hands and will be well advised but should they insist on Specific Performance of the Agreement at this stage we are to accept service.
>
> Yours faithfully,
>
> Sd. Sharikat Goh Guan Ho.
>
> c.c. Clients.
> c.c. M/s. Lim Cheng Chuan & Co.

On 27 January 1981, the following correspondence ensued between GGH and RR – PB1(52 & 53):

> Date: 27th January, 1981
>
> M/s. R. Rajasingam & Company,

Dear Sirs,

Re: Agreement dated 8.1.79 in respect of Lot 532, Mk. 12, S.W.D., Penang

Further to our letter of 11th December, 1980 and on instructions of our clients, we now write to inform you that the above Agreement has now expired and in accordance with cl. 5 has become null and void.

In accordance with cl. 6 of the said Agreement the $150,000 paid by your clients was deposited in fixed deposit with the United Malayan Banking Corporation Bhd as per our letter dated 16th December, 1978 addressed to your clients.

The fixed deposit expired in December 1980 and was renewed for another twelve months with interest at 9%. We are prepared to break the fixed deposit and return the $150,000 plus the accrued interest to your client to date or to hand over the fixed deposit as it stands to you or to your clients at any time but under no obligation to carry on or renew the fixed deposit.

Yours faithfully,

Sd. Sharikat Goh Guan Ho.

c.c. Clients.
c.c. M/s. Lim Cheng Chuan & Co.

27th Jan. 1981

Messrs. Sharikat Goh Guan Ho, Dear Sirs,

Re: Penang High Court Suit No. 8 of 1981.

With reference to your letter dated 11th December, 1980 wherein you stated you are to accept service, we enclose herewith 2 copies of the Writ of Summons by way of service on you on behalf of the 1st and 2nd defendants.

We also enclose herewith the sealed copy of the Writ of Summons for your endorsement thereon of the receipt of the service of the Writ of Summons and return.

Your early return of the Writ of Summons shall be appreciated.

Yours faithfully,

Sd. R. Rajasingam & Company.

The latter summary, since it is a summary of the agreed facts or facts otherwise not in dispute, has not the content of the disagreed documents which is now paraphrased as follows.

(a) the content of the disagreed documents in PB1:

On 12 February 1979, the Collector forwarded GGH's application to the Director of Lands & Mines. On 9 April 1979, the Collector informed GGH that the State Authority had given instructions for action to be taken to acquire the whole of the said land and advised GGH to pay the quit rent. On 10 November 1979, the Collector informed GGH that the inquiry to acquire the land is not ready. On 9 January 1980, the Collector informed GGH that action is being taken to withdraw GN 103/74. On 11 June 1980, the Collector informed GGH that the government had acquired 0.2151 acres of the land, and that action had been taken to cancel GN 103/74 for the balance land. On 19 June 1980, in reply to GGH's letter of 2 June 1980, the Collector informed GGH that GGH's letters of 9 January 1980 and 16 April 1980 were still under consideration. On 9 October 1980, the Collector advised the Estate to collect a compensation sum. On 8 December 1980, RR issued the following notice to GGH–PB1(5):

8th December 1980

Messrs. Syarikat Goh Guan Ho,

Dear Sirs,

Re: Agreement dated 8.1.79 in respect of Lot 532, Mukim 12, S.W.D., Penang

We have been retained by Cheok Swee Lee, Loh Peng Kwan, Loh Cheok Boon, Loh Yip Seng, Loh Gan Teong and Loh Toa Thau @ Loh Eng Kim, the Purchasers herein.

We are instructed by our clients to state that they will complete the purchase of the above property pursuant to the above Agreement notwithstanding the acquisition by the State Government.

In any event, we are instructed by our clients that the Collector of Land Revenue has notified you by letter dated 9.1.80 that action is being taken to withdraw G.N. 103 dated 18.4.74 as far as it concerns the above Lot.

Our clients will insist on specific performance of the Agreement.

In the circumstances, kindly send us the documents of title on the usual undertaking to enable us to prepare the Transfer for your approval.

Yours faithfully,

Sd. R. Rajasingam & Company.

(b) the content of the disagreed documents in PB3:

On 12 October 1977, LCC informed the beneficiaries that (i) the State Government had "acquired" the land, (ii) the inquiry to ascertain the amount of compensation had not been held, (iii) Messrs Khong & Jaafar, in response to LCC's enquiry, was of the opinion that the market value of the land was RM8,000 to RM10,000 per acre, and, (iv) the 2nd defendant had found a purchaser who was prepared to pay RM0.40 per square foot "notwithstanding that the ... property had been acquired." In the same letter LCC asked the beneficiaries if they were agreed to the sale of the land at RM0.40 per square foot.

On 12 October 1977, LCC informed the beneficiaries that a meeting of the beneficiaries had agreed: (i) to the sale of the Estate's land (ii) that all beneficiaries would be entitled to search for prospective purchasers (iii) that any beneficiary who secured "a buyer who is the highest bidder of any particular lot will be entitled to a brokerage commission of 2% of the sale price", (iv) that if an "offer does not exceed the reserved price (ie, the valuation price of M/s. Khong & Jaafar) "the trustees ... have a right to refuse to sell that particular lot ..."

On 5 March 1985, the beneficiaries decided to continue with the defence of the instant action and to sue the government.

On 27 March 1985, the 2nd defendant reminded the beneficiaries that they had agreed to the valuation of the land at RM0.60 per square foot and had agreed to sell the said land at RM1.60 per square foot to the plaintiffs; she advised the beneficiaries not to continue with the defence of the instant action but to complete the sale to the plaintiffs.

On 15 September 1988, the 2nd defendant advised all beneficiaries objecting to the sale to the plaintiff to be present at the trial and to raise their objections to the court.

(c) the content of the disagreed documents in DB2:

Messrs Khong & Jaafar valued the market value i) of the land as of 5 January 1977 at RM2,950,000, (ii) of Lots 2347, 2348, 2349 & 2350, Mukim 12, SW District Penang (the titles replacing Lot 532) as of 8 November 1994 at RM9,600,000. On 29 May 1997, Messrs Leong Ooi Seong & Co., solicitors for Magnapro Sdn. Bhd., offered to buy Lots 2347, 2348, 2349 & 2350 for RM5,587,080 (being RM3 per square foot) subject to the "amicable settlement or otherwise" of Penang High Court 8/81, 24-867-90 and 24-200-93 ... impeding (the trustees) "rights and powers as trustees of the Estate to dispose the said land to Magnapro".

In addition to those agreed and disagreed facts were the testimony of the 2nd plaintiff (PW1), DW1, the 1st and 4th defendants, the witnesses at the trial.

PW1 testified as follows. Sometime in 1977, the 2nd defendant invited him to buy the said land. She told him that the Estate was desirous of selling the land at RM1.60 per sq. feet. He agreed to buy the land. On 8 January 1979, an agreement was signed in the office of GGH. The 1st and 2nd defendants executed the agreement on behalf of the estate. In 1972, he and the other plaintiffs purchased a piece of land at Jalan Terengganu from the Estate. Since, that Jalan Terengganu land had been developed into a housing estate known as Taman Han Chiang. He believed it was the 2nd and 4th defendants who signed that agreement for the Estate.

GGH prepared the agreement in 1979 – PB1(3). Mr. Philip Hoalim witnessed the execution of the agreement. On 12 December 1978, the plaintiffs paid a deposit of RM150,000 to GGH. The State Government of Penang had gazetted its intention to acquire the land. That gazette was GN 103/74 dated 18 April 1974 (PB1(1-2)). The 2nd defendant gave him copies of PB1(8, 11, 12, 14-16, 18-45, 48-57). Sometime in 1992, LCC transmitted to him, through the facsimile, a copy of a notice that quit rent was in arrears – (PB3(28-27). The plaintiffs paid the arrears of quit rent for the years 1985 to 1991, amounting to RM191,274.49. The plaintiffs also paid the quit rent for the years 1992 to 1997 (for the receipts, see PB3(33-52)). The plaintiffs paid a total of RM369,114.84 towards the quit rent for the said land. The 2nd defendant gave him a copy of the Collector's letter dated 9 January 1980 – PB1(22). The land acquired was that in PB1(26) and not PB1(44). The only land acquired was PB1(42). He did not complain about the acquisition of 9,369 sq. feet. The compensation for the acquisition of 9,369 square feet was paid to the vendors. The plaintiffs were prepared to accept the sale of the balance land. LCC was acting for the 4th defendant. On 8 December 1980, he instructed his solicitors to write to the defendants to complete the sale. His solicitors wrote PB1(50). The defendants replied *via* PB1(51 & 52). His solicitors responded *via* PB1(54).

He met the 2nd defendant after the instant action was instituted. She informed him that she would be instituting proceedings for the formal release of the land from acquisition. He believed those proceedings were filed (DB2(5-17)) on 21 August 1981. On 4 December 1981, Justice Mustapha Hussein granted the order for *certiorari* and squashed the acquisition under GN 103/74. On 16 March 1983, the Federal Court dismissed the State Government's appeal against the decision of Mustapha Hussein J. In 1984, the State Government withdrew its appeal to the Privy Council. On 7 April 1986, the plaintiffs withdrew the instant action against the 3rd defendant.

"The plaintiffs were at all times ready to pay the balance purchase price to complete the sale." The 2nd defendant gave him a copy of her advice to the beneficiaries – PB3(16-18). He also received an advice that the quit rent had been increased to RM18,623.60 – PB3(19), and a copy of GGH's letter to the trustees – PB3(20) – that the Estate was not in a position to pay the quit rent. In 1992, LCC asked him to pay the arrears of quit rent. The land was about to be forfeited, and he did not want that to happen.

After the acquisition of 9,369 square feet under GN 884/79, the land was subdivided into 4 lots – lots 2347, 2348, 2349 & 2350. Prior to the instant suit, he was aware that the Collector had agreed to release GN 103/74. The formality of degazetting had not been carried out.

When the agreement was entered, there were 80 to 90 squatters on the land. Now, there are more than 900 squatters. If the agreement was completed in 1980, the added squatters would not have occupied the land. The plaintiffs had not collected any rentals from the land. The plaintiffs are seeking the specific performance of the agreement and damages in lieu of or in addition to specific performance. The plaintiffs were prepared to pay the balance purchase price less the sums advanced.

Under cross-examination, PW1 testified that he was testifying on behalf of all plaintiffs/purchasers. He received the documents in bundle PB1. For the two years after the execution of the agreement, the plaintiffs were informed of the progress of the acquisition under GN 103/74. The plaintiffs were also informed of the steps that the 1st and 2nd defendants had taken to obtain the release of GN 103/74. He did not complain in PB1(50) that the 1st and 2nd defendants had failed to carry out their obligations. The costs of "clearing" the squatters formed the main part of his claim for damages. The plaintiffs purchased the land without vacant possession. The value of the land has increased manifold. Clause 5 provided that the agreement would be null and void if the land is not released from acquisition within two years. However, cl. 5, based on the contents of the Collector's letter of 11 June 1980, was not applicable. He agreed that para 2 of the Collector's letter – PB1(35) – did not indicate the action that would be taken to gazette the withdrawal of GN 103/74. He agreed that the correspondence from the Collector after 11 June 1980 did not indicate the steps that would be taken to withdraw the acquisition. PB1(42-43) was the Collector's last communication to GGH before 8 January 1981. His solicitors appealed to the Collector, in PB1(46), to withhold the inquiry of 29 November 1980 and to degazette GN 103/74. There was no reply to that appeal. By 8 January 1981, no action was taken to degazette GN 103/74 and the State Government had not released the land from GN 103/74.

Under cl. 11 of the agreement the plaintiffs were liable to pay the quit rent for the period after the completion of the sale. He disagreed that the plaintiffs voluntarily paid the quit rents on behalf of the defendants. He disagreed that the land was not free from acquisition.

GGH was the common solicitor in the preparation of the agreement. The terms were agreed by the plaintiffs and the vendors. Under cl. 8 of the agreement it was the duty of the 1st and 2nd defendants to apply for the court's sanction for the sale, and that consent was not obtained.

In re-examination, PW1 clarified that KES was the plaintiffs' solicitor when he wrote PB1(17). After the execution of the agreement GGH solely represented the vendors. The acquisition of 9,369 square feet under GN 884/79 was for road widening purposes. Prior to 8 January 1981, no action was taken by the 1st and 2nd defendants against the Collector on the contents of the Collector's letters, PB1(22) PB1(35) and PB1(53). The plaintiffs paid the arrears of quit rent to protect their interests.

DW1, the Assistant Land Administrator, Daerah Barat Daya, Pulau Pinang, testified that letters PB1(11, 15, 21, 22, 30, 35, 37) were issued by the Collector. The acquisition in PB1(26) was made pursuant to GN 884/79. That acquisition was completed. The acquisition under GN 103/74 proceeded only to the stage of Borang H. Borang H was issued on 7 July 1981 (borang H dated 7 July 1981, tendered and marked as D1). The inquiry was held on 15 June 1981. However the State Government withdrew its intention to acquire the land. Except for the letters PB1(22) and PB1(35), he could not confirm the action taken by the Collector prior to 8 January 1981 to withdraw gazette 103/74. The withdrawal of GN 103/74 was made by gazette 887/84 dated 22 September 1984.

Under cross-examination, DW1 testified that he had no personal knowledge of the acquisition proceedings. He was testifying from the official record under the custody and care of the Collector. In December 1979, there were two intended acquisitions against the said land. GN 884/79 concerned a part of the said land. He agreed with plaintiffs's counsel that Form H, issued on 7 July 1981, acquired more land than was available, as 884/79 had already acquired some of the land on 11 October 1980. He had no knowledge of the reasons for the withdrawal of GN 103/74.

DW2, the 1st defendant testified as follows. He is an additional trustee of the Estate. He signed the agreement. When the agreement was entered, the land was the subject of an intended acquisition. On 10 January 1979, he instructed his solicitors to inform the Collector that the Estate had entered into the agreement and to press the Collector to make up his mind on the intended

acquisition, either acquire or release the land for the sale to the plaintiffs. His solicitors wrote the letters, PB1(8, 9, 10). The Estate was informed, by PB1(15), that the State Government was proceeding with the acquisition of the entire land. His solicitors were eventually informed, by PB1(21), that an inquiry was yet to be fixed. His solicitors responded, by PB1(23), to PB1(22). Further to PB1(35) was PB1(37). The Estate received a notice of inquiry on the intended acquisition of the entire land.

By the terms of the agreement the land had to be released from acquisition within two years, but there was no indication, even on 8 January 1981, that the State Government had withdrawn GN 103/74. Pursuant to GN 103/74, an inquiry was held on 15 June 1981. By letter dated 27 January 1981 GGH informed the plaintiffs that the agreement had lapsed. The trustees wanted to refund the deposit and the accrued interest to the plaintiffs, but the refund was not accepted. Between 8 January 1979 to 8 January 1981 he did not receive the plaintiffs' complaint that the vendors were not performing the agreement.

Under cross-examination, DW2 further testified that the negotiations of the sale were handled by the 2nd defendant and Mr. Philip Hoalim of GGH. The 2nd defendant introduced the land to the plaintiffs and instructed Mr. Hoalim on the sale. He also instructed Mr. Hoalim. He did not instruct the trustees' solicitors to institute proceedings against the Collector on the Collector's letter of 9 January 1980 informing GGH that action is being taken to withdraw GN 103/74. On the Collector's letter of 11 June 1980 informing GGH that action would be taken to "degazette" GN 103/74, GGH wrote to the Collector – PB1(38) – and enquired on the status of the acquisition. He had not seen the letters from the Pejabat Tanah (PB3(53)) and from GGH (PB3(54)). He did not attend any acquisition inquiry and he has no knowledge if the 2nd defendant had attended an acquisition inquiry. In 1977, the trustees commissioned a valuation of the said land; Messrs Khong, Jaafar & Co valued the said land at RM1.60 per sq. ft. That valuation was on a "as it is situation ie, without compulsory acquisition". Asked by learned counsel for the plaintiffs if it would not have been beneficial to the estate "to transfer the land at RM1.60 per sq. ft. upon receipt of the plaintiffs' offer to purchase the land "notwithstanding the acquisition by the Government", he answered, cryptically, that the conditions of the said agreement were not fulfilled and the estate "did not wish to transfer the land". The 2nd defendant's letter (PB3(7)) expressing the 2nd defendant's dissatisfaction with the manner "in which the whole acquisition proceedings and the sale of the said lot to purchasers and subsequent repudiation of sale was not in the interest of the Estate or the beneficiaries", was the 2nd defendant's opinion. On PB3(16), the 2nd defendant's account of the Estate's affairs with regard to the instant action

and the stand adopted by the beneficiaries, he said that the 2nd defendant took it upon herself to apply for an order for *certiorari*, and therefore bore all legal expenses, to quash the intended acquisition of the said land. He agreed with the statements in paras 2 and 4 of PB3(16) and paras. 1, 2 and 3 of PB3(17). He did not write to the 2nd defendant disputing the facts asserted in PB3(16–18). He received PB3(25). On 6 December 1984, he received a letter from GGH informing him that the intended acquisition had been withdrawn. "Condition 5 of the said agreement was not fulfilled and the beneficiaries did not agree to sell at RM1.60 per sq. ft after the agreement had lapsed." Quit rent was in arrears from the year 1985. Thereafter, quit rent was not paid by the Estate. He was told that quit rent was not paid and that the land might be forfeited. The Estate received a notice, PB3(26), that quit rent was in arrears. He took no steps to pay the arrears of quit rent. The plaintiffs paid the arrears of quit rent for the years 1985/86 to 1997. The Estate did not ask the plaintiffs to pay the arrears of quit rent. In 1979, all beneficiaries were of full age. With the consent of 9 of 15 beneficiaries, he and the 2nd defendant filed an application (Penang High Court Originating Summons 200-93) for leave to settle the instant suit. In re-examination, DW2 clarified that GN 103/74 was yet not "degazetted" on 8 January 1981. Six of the nine beneficiaries revoked their irrevocable consent for the settlement of the instant suit.

The 4th defendant testified, and his testimony was extremely short, as follows; (i) he was not consulted, (ii) he had not given his consent for the sale, (iii) he was not informed beforehand of the agreement, (iv) he only got to know of the said agreement, in January or February 1979, from his solicitor, LCC, (v) he had not instituted action against the trustees as the Estate was in the process of being wound up, (vi) he did not know of the proposed sale at RM1.60 psf (iv) he had not contributed towards the payment of the quit rent even though it was in arrears after 1985.

Mr. Abraham, for the 1st and 2nd defendants, submitted that cl. 5 relieved the 1st and 2nd defendants from "the full force of the agreement". The word "release" means "withdrawal", he expounded, "and on 8 January 1981 the State had not withdrawn GN 103/74 in accordance with the Act." That, he said, was only done in 1984. The Collector's letters (PB1(22 & 35), PB3(53 & 54)) on the withdrawal of GN 103/74 is not the complete picture. The State had not withdrawn GN 103/74 nor released the said land from the restrictions imposed under the Land Acquisition Act 1960. Instead, the State proceeded with the acquisition until the stage of Borang H and resisted the 2nd defendant's action to annul GN 103/74 even long after 8 January 1981 had passed. "The agreement to sell was conditional upon the fulfillment of cl. 5 ... the existence of (the agreement) and the performance (was) subject to the fulfillment of (that) condition." When the acquisition was not released, "both

were relieved of the terms of the agreement". "The intention of the parties was a sale subject to the release of the land within two years", he surmised. "If the land was not released" he further argued, "it would follow that acquisition would follow, the vendors ... would not be in a position to complete the sale. Conversely, for the purchasers, they would have no land to buy. At best, they would have the compensation (and) that was not what they had contracted for." "Given (that) cl. 5 is clear, it is not open to the plaintiffs to state they are prepared to complete because the ... parties (had) agreed to a fixed time frame." Supporting his contention that the agreement was void, learned counsel referred to *National Land Finance Co-operative v. Sharidal* [1983] 2 MLJ 211 (where the Federal Court held that an agreement became void because the Foreign Investment Committee refused to approve the sale) and to three passages (in pp. 50, 57 & 75) in *The Sale and Purchase of Real Properties in Malaysia* by Visu Sinadurai (as he then was). Concluding his address, learned counsel said, "there was no agreement; alternatively, the agreement was that the parties would be relieved if the acquisition was not released".

Mr. Ong, for the 4th defendant, adopting that submission of Mr. Abraham, appended as follows. The legal effect, when the agreement became null and void, was that (i) there was no agreement to be performed, (ii) there was no right of any waiver (he did not elaborate in what sense) and, (iii) the conduct of the parties is irrelevant. Citing *Aberfoyle Plantations Ltd. v Khaw Bian Cheng* [1960] 26 MLJ 47 (where the Privy Council held as a reasonable general principle – Aberfoyle contracted by a conditional contract to sell 1,336 acres of rubber plantations to Khaw, but Aberfoyle's title to 182 acres depended on the success of its negotiations for the renewal of seven leases, and the renewal of the leases was not obtained by the completion date and Khaw brought an action for the return of the deposit – that where a conditional contract of sale fixes the date by which the condition is to be fulfilled then the date must be strictly adhered to and the time allowed is not to be extended by references to equitable principles) and *Jaafar bin Ibrahim v. Gan Kim Kin* [1985] 2 MLJ 24 (where the Supreme Court applied the principle as enunciated in *Aberfoyle*) Mr. Ong said, "time was of essence". He lastly submitted (but the 4th defendant, with respect to learned counsel, had not so pleaded nor so testified) that the 4th defendant and the other trustee, Boey Khoon Heng, should have but had not signed the said agreement.

According to Mr. Sethu, for the plaintiffs, "the only issue is whether the plaintiffs are entitled to specific performance." "The primary question is the construction of the agreement. On 8 January 1981, the agreement was valid, binding and enforceable; the fact that certain things were required to be done did not detract from its validity". The plaintiffs would be paying RM1.60 p.s.f.

as opposed to the acquisition price of RM0.60 p.s.f. The plaintiffs were taking a risk, but the contract was beneficial to the Estate." "Clause 5 should be read carefully", he said, as "the State had agreed to release (the said land) by those letters; cl. 5 was exhausted the moment the first letter was received". He submitted that the 1st and 2nd defendants merely pleaded they were not in a position to complete the sale; they did plead that they failed and or refused to complete the sale. He remarked that the 1st and 2nd defendants could not refuse to complete the sale and that the intended acquisition did not restrain the completion of the sale. By letter dated 8 December 1980, the plaintiffs threatened specific performance. That, he said, was a waiver of cl. 5 of the agreement. Clause 5 never prevented the completion of the sale. Clause 5 was inserted for the benefit of the plaintiffs. The Estate merely replied that it would abide by the letter of the agreement. The right of the Estate was to RM1.60 p.s.f. and it would be paid in full. The plaintiffs were taking the risk of the intended acquisition and it is irrelevant whether the plaintiffs would suffer loss. He contended that the agreement had not come to an end when the suit was filed. The Estate must perform cl. 8. Since the whole agreement was repudiated, the defendants cannot rely on particular clauses.

On Mr. Ong's submission that the 4th defendant had not signed the agreement, Mr. Sethu submitted, pointing to the pleadings, that the validity of the agreement was not challenged on the ground that the other trustees were not parties; it was challenged on the ground that the 4th defendant's prior consent, as beneficiary of the Estate, was not given. The 4th defendant admitted he received LCC's letters (PB3(3 & 5) on the sale of the said land.

Counsel focused on "waiver" in their respective replies. "Waiver was not pleaded", Mr. Abraham replied. "In any event", he said, "waiver does not apply because it can only apply if cl. 5 was for the exclusive benefit (of the plaintiffs) and not when it (was) an essential condition of the agreement." "Both parties recognised the land was subject to acquisition." "Both parties recognised it was uncertain when the land would be released." Therefore, "both parties agreed not to have their obligations open-ended or for an indefinite period but to place a definite time period to ascertain the validity of the agreement." "Under the terms of the agreement, the purchasers were not prepared to buy and the vendors were not prepared to sell if the land was still subject to acquisition", he made of the agreement.

Mr. Ong replied that the terms of the agreement would not permit a waiver. "Reading cls. 3 and 5 conjunctively, the parties agreed to the outcome in the event that acquisition was not withdrawn. The parties agreed at the outset not to waive rights."

To those replies, Mr. Sethu's riposte was that waiver is a legal consequence of pleaded facts, and it was pleaded, in para. 14 of the statement of claim, that the plaintiff required the 1st and 2nd defendants to complete the sale.

It is convenient to dispose beforehand, since it is the less involved issue, the 4th defendant's "challenge" on the authority of the 1st and 2nd defendants.

On 11 April 1996, the 4th defendant applied (encl. 91) to amend his defence dated 24 August 1982. On 8 July 1996, this court, delivering its judgment on the said application, said the following:

> .... the 4th defendant's defence is a challenge to the validity of the agreement that the plaintiffs seek to specifically enforce; para. 4 is the plea in general, while paras. 5, 6 & 8 are the 3 specific grounds – (i) the 1st and 2nd defendants entered into the agreement without the approval of court, in breach of trust and in the absence of proper authority (ii) the plaintiffs had knowledge that the 1st and 2nd defendants did not have the lawful authority to enter into the said agreement, and (iii) the agreement has been terminated as the subject property was not released from the notice of acquisition within two years from 8 July 1979 – for the invalidity of the agreement.
>
> That being the substance and spirit of the defence, the suit, between the plaintiffs and the 4th defendant, is that of a claim for the specific performance of an agreement and a defence that the 1st and 2nd defendants had no authority or powers to enter into the agreement. That is the undoubted character of the present suit. However, the proposed para. 9 of the amended defence, to wit, that the purchase price of the subject property "is below market value" and that the sale "is against the interest of the Estate", would turn the present character of the suit, from a contest on the 1st and 2nd defendants' legal capacity and powers or lack of it to enter into the agreement, into a suit with an additional contest on the fair market value of the subject property and the interests of the Estate. That additional contest would not be consistent with the character of the present defence, as the proposed para. 9 does not arise out of the same facts or substantially the same facts in respect of which the defence has been filed, but springs forth reasonably from a set of facts quite unrelated to the defence that has been filed, unlike *Yamaha Motor Co. Ltd v. Yahama Malaysia Sdn. Bhd. & Ors (supra)* where the allegation of fraud, even assuming it is a new cause of action, arises from the same facts as the original action.
>
> There is no specific traverse in the present defence to the allegations of fact made by the plaintiffs in their statement of claim that, (i) the 3rd defendant apart from the gazette notification of its intention to acquire the property has not taken any steps to acquire the said property (ii) the 1st and 2nd defendants failed to carry out and even attempted to rescind the said agreement (iii) the 1st and 2nd defendants failed to complete the said agreement despite the plaintiffs' notice to them so to do (iv) the plaintiffs are ready willing and able

to complete the said agreement (v) for the two years after 8 January 1979, the 3rd defendant had not intimated that it would refuse to release the said land from the restrictions imposed by an acquisition, (vi) the 3rd defendant has not taken any step towards the compulsory acquisition of the said land, **and those allegations of facts must be deemed as admitted by the 4th defendant** (emphasis added).

(For the full judgment, see *Cheok Swee Lee v. Loo Choo Teng* [1996] 3 CLJ 433)

And that judgment of 8 July 1996, final and as conclusive with the discontinuance of the 4th defendant's appeal, is binding on the 4th defendant. To recapitulate, the 4th defendant testified; (i) he was not consulted, (ii) he had not given his consent for the sale, (iii) he was not informed beforehand of the agreement, (iv) he only got to know of the said agreement, in January or February 1979, (v) he had not instituted action against the trustees as the Estate was in the process of being wound up, (vi) he did not know of the proposed sale at RM1.60 psf (iv) he had not contributed towards the payment of the quit rent even though it was in arrears after 1985. Given the pith of that testimony, never mind what he pleaded, the 4th defendant disputed the authority of the 1st defendant and Ong Thai Hong to enter into the agreement on the ground that his consent, as a beneficiary, was not obtained. He did not testify, so there was no evidence and neither was it pleaded, that he and the other "trustee" were necessary parties to the said agreement and or that the 1st and 2nd defendants could not execute the said agreement, without the others, and bind the Estate.

On the 4th defendant's denial that he had not given his consent for the sale, he was not only not supported by the documentary evidence (he was informed, on 12 October 1977, of the proposed sale at RM0.40 p.s.f. see PB3(3-5); he was informed, on 1 March 1979, of the sale – see PB1(12); there is no record of the 4th defendant's objection to the sale in the minutes of the meeting of the trustees and beneficiaries – see PB3(12-14); the 2nd defendant's letter to all beneficiaries, and it was not controverted by the 4th defendants has it that every beneficiary agreed to the sale at RM1.60 p.s.f. – see PB3(16-18)), a bare denial as such, but was also devoid, so it is perceived, of all *bona fides.* On 6 June 1997, the 1st defendant was examined by Mr. Sethu. Mr. Abraham objected to Mr. Sethu's "questions on the background facts leading to the said agreement". Mr. Abraham informed the court that the 4th defendant would be accepting the validity of the agreement even though the 4th defendant would be maintaining that the agreement could not be performed because of the acquisition. Mr. Ong then informed the court, "I have instructions not to challenge the validity of the 1st and 2nd defendants' action in entering into the agreement. The 4th defendant concedes that the agreement was validly

entered by the 1st and 2nd defendants. The terms are not disputed. We abide by the four corners of the agreement". That day, hearing was adjourned for Mr Sethu to complete his examination of the 4th defendant.

When trial resumed on 12 August 1997, Mr Sethu attempted to examine the 1st defendant on the consent of the beneficiaries. Mr Abraham interjected, "I object. Consent is not an issue in this proceeding. I have instructions to confirm that both the 1st and 2nd defendants informed all beneficiaries of the intended sale prior to the execution of the agreement, and that no objections were received prior to the execution of the agreement." Thereupon, Mr Ong informed the court, "my present instructions are and I hereby retract and take back all that I have said in p. 27 of the Notes of Proceedings. I am now reclaiming the defence in amended form of the 4th defendant. My instructions are that the consent of the 4th defendant was not obtained".

The said agreement was executed by the 1st defendant and the 2nd defendant, the latter as the attorney of Ong Thai Hong. The documents (see PB3) evince the trustees had the legal capacity to represent the estate. In his last will, the deceased, Ong Joo Sun, appointed two of his children, the defendant and one Ong Gaik Neoh, as his executors. What transpired thereafter was not disclosed. However, taking it entirely from the court proceedings (Penang High Court Originating Summons 156/75) between one of the three (3) wives of the deceased of the one part and the 4th defendant and one Boey Khoon Heng of the other part, the following judicial orders (the part relevant to the legal capacity of the trustees to act for the Estate) were granted:

(i) on 25 August 1975, *inter alia*, that the deceased's immovable properties be sold with the approbation of the court and that the solicitors for the parties have the joint conduct of the sale;

(ii) on 15 August 1977, *inter alia,* that the 1st defendant and Ong Thai Hong be appointed additional trustees, together with the 4th defendant and Boey Khoon Heng, of the Estate;

(iii) on 15 February 1978, *inter alia*, that the 1st defendant and Ong Thai Hong do execute all documents to effectuate the sale of specified properties (not including the said land) "in substitution" of the 4th defendant and Boey Khoon Heng;

(iv) on 6 November 1978, *inter alia*, that the 1st defendant and Ong Thai Hong be vested certain specified properties (not including the said land) to effectuate the sale thereof;

(v) on 8 January 1979, *inter alia*, that Ong Thai Hong, with effect from 8 January 1979, be discharged as a trustee, and that the 2nd defendant

> be appointed an additional trustee in place of Ong Thai Hong, and that the 2nd defendant be empowered to sign and execute all documents relating to the administration of the Estate "in substitution" of the 4th defendant and Boey Khoon Heng.

It would appear therefore that the 1st defendant and Ong Thai Hong, as of 15 February 1978, were the only trustees of the Estate with administrative powers (the 4th defendant and Boey Khoon Heng effectively sidelined) and that the 2nd defendant appointed a trustee on 8 January 1979 was empowered to sign and execute all documents relating to the administration of the Estate "in substitution" of the 4th defendant and Boey Khoon Heng. Furthermore, by a Power of Attorney dated 5 October 1978, the said Ong Thai Hong appointed the 2nd defendant his lawful attorney to carry out his duties *qua* trustee of the Estate. Therefore, on 8 January 1979, both the 1st and 2nd defendants (in the case of the 2nd defendant, as attorney if not trustee) were the only persons empowered to administer the Estate.

On the interpretation of the said agreement, in judicial proceedings, differing views on a contract is resolved by the proper interpretation or construction of the contract.

The process of interpretation starts by a consideration of the language used by the parties in the document itself. That consideration of the language is to ascertain the meaning of the words in the document and to determine (subject to any rule of law) the legal effect or the effect to be given to those words (see *Chatenay v. The Brazilian Submarine Telegraph Co., Ltd.* [1892] 1 QB 79), so as to ascertain further "... the mutual intentions of the parties ... as to the legal obligations each assumed by the contractual words in which they sought to express them" (*Pioneer Shipping Lyd. v. B.T.P. Tioxide Ltd* [1982] AC 724 per Lord Diplock). The intention of parties is strictly the meaning of the words they have used. "The suggestion of an intention of parties different from the meaning conveyed by the words employed is no part of interpretation, but is mere confusion" (*Great Western Railway v. Bristol Corpn* [1918] 87 LJ Ch 414 per Lord Shaw). Thus, in *Re Jodrell* [1890] 44 Ch 590, Lord Halsbury said:

> I do not know what the testator meant except by the words he has used ... For myself, I am prepared to look at the instrument such as it is; to see the language that is used in it; to look at the whole of the document and not to part of it; and having looked at the whole of the document to see, if I can, through the document what was in the mind of the testator. Those are general principles for the construction of all instruments and to that extent it may be said that they are canons of construction.

The language used must be considered in the light of the surrounding circumstances and the objects of the contract, in so far as it has been agreed or proved. But it would be erroneous to assume an intention apart from the language used in the instrument and bend the language in favour of the assumed intention (*Leader v. Duffy* [1888] 13 App. Cas. 294), "to construe an instrument contrary to what the words of the instrument itself convey" (*Smith v. Cooke* [1891] AC 297 per Lord Halsbury), "to introduce uncertainty by starting from the viewpoint of a general rule governing such clauses, and then to resolve the question of construction by reference to it ... (as it is) the court's task is to determine the meaning of the provision, against its contractual and contextual sense" (*S.p.A. v. Tradax Ocean Transportation* [1987] All ER 81), or "to construe and apply not the clause which the parties have entered into but the different clause which they might have ... entered into" (*Equity & Law Life Assurance Society plc v. Bodfield Ltd* [1987] 281 EG 1448).

In attempting to ascertain the presumed intention of the parties, the court will adopt an objective approach, that is to say that it will consider what would have been the intention of reasonable persons in the position of the actual parties to the contract. Thus in *Reardon-Smith Line Ltd v. Ynquar Hansen-Tangen* [1976] 1 WLR 989, Lord Wilberforce said:

> When one speaks of the intention of the parties to the contract one speaks objectively – the parties cannot themselves give direct evidence of what their intention was – and what must be ascertained is what is to be taken as the intention which reasonable people would have had if placed in the situation of the parties.

The court is entitled to look at evidence of the actual factual background known to the parties at or before the date of the contract; accordingly, evidence of the surrounding circumstances (Kam Mah Theatre Sdn. Bhd. [1994] 1 CLJ 1), of the "genesis" and of the "aim" of the transaction, limited however to objective facts, to place the contract in its correct setting – the factual matrix is – admissible. Thus in *Ipswich Diocesan Board of Finance v. Clark (No. 2)* [1975] 1 WLR 468, Sir John Pennycuick, delivering the judgment of the English Court of Appeal, said:

> It is no doubt true that in order to construe an instrument one looks first at the instrument and no doubt one may form a preliminary impression on such inspection. But it is not until one has considered the instrument and the surrounding circumstances in conjunction that one concludes the process of construction.

However, the court may not look at the subsequent conduct of the parties to interpret a written contract unless that conduct amounted to a variation of the contract or gave rise to an estoppel (*James Miller and Partners Ltd. v. Whitworth Street Estates (Manchester) Ltd* [1970] AC 583).

Words are construed, in their grammatical and ordinary sense, unless that would lead to some absurdity, or some repugnance or inconsistence with the rest of the instrument, in which case the grammatical and ordinary sense may be modified, so as to avoid that absurdity and inconsistency, but no further (*Grey v. Pearson* [1857] 6 HL Cas 61 per Lord Wensleydale); the ordinary meaning of a word is its meaning in its plain, ordinary and popular sense, unless the context points out some special and particular sense (*Robertson v. French* [1803] 4 East 130). In the case of a word with both an ordinary and a specialised meaning, the popular meaning will prevail unless it is proved first that the parties intended to use the word in the specialised sense.

There is a general presumption against implying terms into written contracts. Rather, the presumption is that parties who have entered into written engagements with written stipulations have expressed all the conditions by which they intended to be bound under the instrument (*Aspdin v. Austin* [1844] 5 QB 671; *Luxor (Eastborne) Ltd v. Cooper* [1941] AC 108) and care must be taken not to make a contract speak where it was intentionally silent (*Churchward v. R* [1865] LR 1 QB 173). The presumption against adding terms is stronger where the contract is a written contract which represents an apparently complete bargain (*Duke of Westminister v. Guild* [1985] QB 688).

Where the bargain is obviously not complete, the court may imply the missing terms if the following criteria (some of which may overlap) set by Lord Simon of Glaisdale in *B.P Refinery (Westernport) Pty. Ltd v. Shire of Hastings* [1978] 52 AJLR 20 are fulfiled:

(i) if it is reasonable (*Young and Marten Ltd v. McManus Childs Ltd* ([1969] 1 AC 454) and equitable (*B.P Refinery (Westernport) Pty. Ltd v. Shire of Hastings* [1978] 52 AJLR 20),

(ii) if it is necessary to give business efficacy to the contract (*The Moorcock* [1889] 14 PD 64),

(iii) if it is obvious (*Shirlaw v. Southern Foundries (1926) Ltd* [1939] 2 KB 206),

(iv) if it is capable of clear expression (*Shell U.K. Ltd v. Lostock Garage Ltd* [1976] 1 WLR 1187) and

(v) if it is not inconsistent with the express terms of the contract or its general tenor (*Lynch v. Thorne* [1956] 1 WLR 303).

And a court, subject to the qualification that there is absent a contrary intention, would be more ready to imply a term in cases "where a special relationship such as those recognised by the law exists" (eg. banker and client,

employer and employee, principal and agent, vendor and purchaser of immovable property, landlord and tenant) than in cases where no such special relationship exists (*Datuk Yap Pak Keong v. Sababumi (Sandakan) Sdn. Bhd.* [1997] 1 CLJ 23 at 54, per Gopal Sri Ram JCA).

At any rate, in general, a term is necessarily implied in a contract that neither party shall actively prevent the other from performing it, which itself is a breach of the contract. The classic formulation of that implied term is that of Cockburn CJ in *Stirling v. Maitland* [1864] 5 B & S 841:

> I look on the law to be that if a party enters into an arrangement which can only take effect by reason of the continuance of a certain state of circumstances, there is an implied engagement on his part that he shall do nothing of his own motion to put an end to that state of circumstances, under which alone that arrangement can be operative.

There is also imposed on parties a general duty to co-operate in the performance of a contract. The duty includes a duty not to prevent the fulfillment of conditions see (*Mackay v. Dick* [1881] 6 App. Cas 251, where the buyer refused to give a machine a proper trial, and the House of Lords held it was a breach of contract) and to act *bona fide* (perhaps reasonably), where the condition to be fulfilled is one which is dependent on the discretion of one party to the contract, to procure the fulfillment of the condition (*Hudson v. Buck* [1877] 7 Ch. D. 683).

To arrive at the true interpretation of a document, a clause must not be read in isolation, but must be considered in the context of the whole of the document (*Chamber Colliery Ltd v. Twyerould* (1893) [1915] 1 Ch 268; *Re: Jodrell (supra)).* As a corollary of the principle that a document must be construed as a whole, all parts of it must be given effect where possible (*Re Strand Music Hall Co. Ltd* [1865] 35 Beav 153) and no part of it should be treated as inoperative or surplus (*S.A. Maritime et Commerciale of Geneva v. Anglo-Iranian Oil Co. Ltd* [1954] 1 WLR 492) unless it is impossible to reconcile it with another and more express clause in the same deed (*Re Strand Music Hall Co. Ltd (supra)*).

But the two most important and comprehensive rules of general application in construing a written instrument are, (i) that it shall, if possible, be so interpreted *ut res valeat potius quam pereat,* and, (ii) that such a meaning shall be given to it as to carry out and effectuate to the fullest extent the intention of the parties. Put together, *benigne faciendae sunt interpretationes ut res magis valeat quam pereat,* the rule is that a liberal construction should be put upon written instruments, so as to uphold them, if possible, and carry into effect the intention of the parties. Every document ought to be construed, if possible, so as to make it operative. "It boils down to this. Where a contract

is couched in unambiguous language, the court must give effect to it. But where the terms of a contract are ambiguous then the court may imply a term in order to uphold the transaction" (*Datuk Yap Pak Leong v. Sababumi (supra)* at p. 53 per Gopal Sri Ram).

In the case of the instant agreement, and it is looked at as a whole throughout the entire process of its construction, it is evident that the intention of the plaintiffs was to buy whilst the intention of the defendants was to sell the said land. Put differently, the parties agreed to a mutual exchange, of land for money in the case of the plaintiffs, and of money for land in the case of the defendants. That mutual exchange, barring the "accoutrements", was at the heart and soul of the bargain between the parties. Obviously, that intended exchange could not be realised if one of the parties "have not" the land or the funds, as the case may be, for the exchange. That being so, and the following is equally true of all true land purchase agreements, the agreement therefore incorporated, (i) recitals on the defendants' title to the land in question – the defendants' written word that they "have" the land, and, (ii) provisions on time and manner of the payment of the purchase price – the plaintiffs' assurance that they have or would have the money to carry through the exchange.

However, the said land that the Estate had in 1979 was the subject, true since 1974, of intended acquisition. But that land, since the intended acquisition had not proceeded and indeed may not proceed to actual acquisition, was yet the property of the Estate. That however was of cold comfort, relatively speaking, to the Estate, as the quit rent that the Estate could ill afford was yet payable and would be payable, so long as the land is not acquired, and the burden of the quit rent could not be off-loaded, by sale, since prospective purchasers would be frightened off even by intended acquisition. Needless to say, again relatively speaking, the Estate was not in an enviable position.

Against that backdrop, on 8 January 1979, accounting somewhat for GGH's request to the Collector to acquire "forthwith" or release the land from acquisition, the parties entered into the said agreement.

As observed, the exchange the parties intended could not be realised if there was not the land or the funds, as the case may be, for the exchange. Of course, whether the Estate would have or would have not the land for the exchange, because of the notice of intended acquisition, was not a matter, reasonably so, within the knowledge, command and control of the parties. Therefore, their agreement had to take into account, and so it was taken into account, the uncertainty presented by the intended acquisition to their agreed exchange. In other words, both parties agreed, if not for the intended acquisition, to execute and would have executed, in all probability, the agreed exchange.

In the words of cl. 3:

> the purchase shall be subject to:
>
> (a) The property being released by the Penang State Government;
>
> (b) The Trustees deducing a good and marketable title to the property sold;
>
> (c) The property sold to be free from all encumbrances whatsoever;
>
> (d) without vacant possession;
>
> (e) Completion of the purchase to be within six months from the date of court Order sanctioning the sale by the Trustees.

The words "subject to" take a number of meanings (*Government of the Federation of Malaya v. Surinder Singh Kanda* [1961] MLJ 121). They take the effect of the words following it (see *Words and Phrases Judicially Defined* for the range of meanings), as "subject to" without the words following it is incomprehensible. Therefore, the words "subject to" in cl. 3 take the effect of the words following it, the particular effect, because there were five "provisos", in each case of the particular proviso following it.

Up to this point, the use of the word "condition" to refer to the terms in the said agreement has been avoided. This is because the word "condition" takes a variety of senses, there is even a lexicon on the various senses, and the use, unless the sense is evident, may not be constructive. It may mean a prerequisite to the very existence of the agreement, a provision or stipulation or a term of art (*Wickman Machine Tool Sales Ltd. v. Schuler (L) A.G.* [1970] 1 WLR 840 per Lord Denning MR).

Lord Denning MR explained a condition in the sense "as a term of art".

> A 'condition' in this sense is a stipulation in a contract which carries with it this consequence: if the promisor breaks a 'condition' in any respect, however slight, it gives the other party a right to be quit of his future obligations and to sue for damages unless he, by his conduct, waives the condition, in which case he is bound to perform his future obligations, but can sue for the damages he has suffered. A 'condition' in this sense is used in contrast to a 'warranty'. If a promisor breaks a warranty in any respect, however serious, the other party is not quit of his future obligations. He has to perform them. His only remedy is to sue for damages.

In his dissenting judgment, Stephenson LJ said:

> To my mind the natural and ordinary meaning of making something a condition of an agreement is that it is made something on which the agreement depends. If the condition is not performed the agreement goes. If the condition is one

> to be fulfilled before the agreement comes into force, it is what lawyers have called a condition precedent (or a contingent or casual condition), that is a condition of the agreement's coming into force, and if it is not performed there is no agreement. If the condition is to be performed after the agreement has come into force, it is what lawyers have called a condition subsequent, or a condition inherent (or a promissory condition), that is a condition of the agreement's continuing; and if it is not performed the agreement comes to an end. In a sense all conditions are conditions precedent, some to an agreement beginning, others to its continuing. One thing is a condition of another when its existence is essential to that other thing, when the existence of each depends on the existence of the other, and that is so whether one of the two things is to be done once (the simplest case) or is to be repeated or continued or is an agreement to do one or more things.

Goff J, in *Wood Preservation Ltd v. Prior* [1969] 1 WLR 1077, identified the following four types of conditional arrangements.

(1) where the arrangement between the parties, which would otherwise be a contract, is subject to a condition precedent to the making of an agreement at all;

(2) where there is a contract under which one party assumes a unilateral obligation in a certain event, and there is no obligation on the other party to bring about that certain event;

(3) where there is a bilateral contract subject to a condition precedent with an immediate obligation on one of the parties to perform the condition or to use his best endeavours to perform it;

(4) where there is an immediate contract but on the basis that one of the parties will obtain some particular information or assurance or perform some particular term which goes to the root of the contract.

A condition precedent "is a condition which must be fulfilled before any binding contract is concluded at all". (*Trans Trust S.P.R.L. v. Danubian Trading Co. Ltd.* [1952] 2 QB 297 per Denning LJ (as he then was)). The expression "condition precedent" is also used, and should be restricted, to cases where non-fulfillment of the condition prevents the formation of a binding agreement or suspends its operation until fulfillment of the condition (see *Bentworth Finance v. Lubert* [1968] 1 QB 680, where the buyer proved that the finance company's agents had agreed that the hire installments would not become payable until the company had provided a log-book for the car, and the court held that until the log-book was provided "there was no contract at all; *Pym v. Campbell* [1856] 6 E & B 370, where the written agreement provided for the sale of a share in an invention, and the defendant proved that the agreement was not to become binding until the invention had been

approved by an engineer, and the engineer had not approved it, and the court held that no agreement had come into existence).

Contractual obligations may be divided into conditions, warranties and intermediate terms (which lie between the other two). It is a question of construction into which category a particular obligation falls (*Bettini v. Gye* [1876] 1 QBD 183; *Glaholm v. Hays* [1841] 2 M & G 257). If it falls into the second category, it is a question of fact (rather than of construction) whether in particular circumstances one party is entitled to treat the contract as having been repudiated by the other. "Nevertheless (a term) may be treated as a condition precedent, provided that it appears that the parties intended it should have that effect" (*London Guarantee Co. v. Fearnley* [1880] 5 App Cas 911). However, the mere fact that a contract uses the word "condition" is not conclusive (*Schuler (L) A.G. v. Wickman Machine Tool Sales Ltd* [1974] AC 235). A condition subsequent is a condition which brings a subsisting liability to an end on the fulfillment of the condition.

With that survey on "conditions" in its various senses, it is timely to address the "provisos" in cl. 3. The intent of the parties – from the construction of the entire agreement involving the ascertainment of the words used and the legal effect of those words, in the light of the surrounding circumstances and the object of the contract, so far as that has been agreed or proved, and an objective approach was adopted – was an exchange of land for money, and *vice versa.* The parties agreed to that exchange, but that exchange was impeded by the intended acquisition, as there could not be an exchange if the land was compulsorily acquired. On the other hand, there could be an exchange if the intended acquisition was out of the way.

It was in that uncertain setting that cl. 3(a) stipulated, surely taking into account the uncertainty presented by the intended acquisition, "the purchase shall be subject to the property being released by the Penang State Government". Accordingly, "subject to" take the sense of "if" and cl. 3(a) must mean "the purchase shall be completed if the property is released from acquisition", or, conversely, "the purchase shall be aborted if the property is not released from acquisition". Objectively, it could not be read any other way.

Clause 1 of the agreement reads as follows:

> the trustees will sell and the purchasers will buy the land ... more particularly described in the Schedule hereto subject to an Order of court and the property being released by the State Government from the restriction as published in the Government of Penang Gazette notification No. 9 of 1974 and all other Government restrictions whatsoever.

As prescribed in cl. 1, the Schedule to the agreement identified the land as "Lot 532 Mukim 12 South East District Penang with an area of 42 acres 3 roods and 3 poles or 1,871,718 sq. ft.". The subject of the sale was clearly identified. However, cl. 1 was silent on the condition, in the sense of the state of being, of the land that would pass. It must be constructed from the rest of the agreement.

Sub-clauses 3(c) and 3(d) read respectively, "the purchase shall be subject to the property sold to be free from all encumbrances whatsoever" and "the purchase shall be subject to without vacant possession". As said before, the words "subject to" take the meaning of the words following it. In the case of 3(c), the words "the property sold to be free from all encumbrances whatsoever" take the sense and effect that the land would be free from all encumbrances. Therefore, the words in 3(c) – "the purchase shall be subject to the property sold to be free from all encumbrances whatsoever" – mean that the purchase shall be on the basis/footing that the said land would be free of all encumbrances. 3(c) cannot mean that the purchase shall be conditional (in the sense of a condition precedent or subsequent) upon the said land being free from all encumbrances, as that construction – a construction permitting the defendants to avoid the sale by encumbering the land after the execution of the agreement – is entirely inconsistent with the general tenor of the agreement that the sale would be aborted only if the land is not released from acquisition.

In the case of 3(d), the words "without vacant possession mean, as the words convey, without vacant possession. Taking into account that land is sold either with or without vacant possession, as a rule to avoid dispute, 3(d) – "the purchase shall be subject to without vacant possession" – means that the land is sold without vacant possession.

It is an implied term, is it not, that one who contracts *qua* vendor represents to his purchaser that he has or would have title to pass. And it is true, is it not, that a sale could not be completed if the vendor had no title to pass. Then, 3(b); – "the purchase shall be subject to the trustees deducing a good and marketable title to the property sold" – was no more than the explicit of the implicit. 3(b) was the vendors' warranty of their title to the said land and not a condition precedent or subsequent, or a condition which prevents the existence of a binding contract or a condition which suspends contractual obligations until fulfillment of the condition. It merely means that the defendants shall deliver a good and registrable title – even in 1979, a marketable title under the common law deeds system was no longer applicable – to the plaintiffs.

The meaning of 3(e) – "the purchase shall be subject to completion of the purchase to be within six months from the date of court Order sanctioning the sale by the trustees" – was alluded to in the agreement. Clause 8 reads, "the trustees shall also apply to court for a formal sanction to sell the property in accordance with the Probate and Administration Ordinance 1959". In plain language, the defendants covenanted to obtain formal sanction for the sale. However 3(e), as were 3(b), 3(c) and 3(d), could not be objectively construed as a condition precedent or subsequent, as that would be a construction permitting the defendants to abort the sale, even if the land was released from acquisition, just by not applying for formal consent. Consistent with the tenor of the agreement, cl. 3(e), read together with cl. 5, must be construed as a performance covenant, *videlicet*, the defendants to apply for formal consent, the plaintiffs to pay the balance purchase and the defendants to execute all deeds transferring a good and registrable title to the plaintiffs "within six months from the date of court Order sanctioning the sale".

Therefore, in substance, of the five "provisos" in cl. 3, only 3(a) was a true condition; 3(b) was the defendants' warranty of their title, 3(c) and 3(d) were terms on the state of being of the land, whilst 3(e) was a performance covenant.

Similarly, it is observed that cl. 8 – "the trustees shall also apply to court for a formal sanction to sell the property in accordance with the Probate and Administration Ordinance 1959" – was also the vendors' performance covenant. In *Smallman v. Smallman* [1971] 3 All ER 717, the parties reached an agreement for a settlement of a divorce. The settlement was "subject to the approval of the court. Lord Denning MR said:

> In my opinion, if the parties have reached an agreement on all essential matters, then the clause "subject to the approval of the court" does not mean there is no agreement at all. There is an agreement, but the operation of it is suspended until the court approves it. It is the duty of the one party or other to bring the agreement before the court for approval. If the court does not approve it, it is not binding on the parties. But, pending the application to the court, it remains a binding agreement which neither party can disavow.

In the instant case, the 1st and 2nd defendants had an express duty (cl. 8) to apply for that formal consent, the general duty to co-operate and not to prevent the fulfillment of cl. 8 (applying *Mackay v. Dick (supra)*) to act *bona fide* (perhaps reasonably) to procure the fulfillment of cl. 8 (applying *Hudson v. Buck (supra)*). The said agreement will be construed so far as possible in such a manner as not to permit the defendants to take advantage of the 1st and 2nd defendants' failure to perform cl. 8 (see *Rede v. Farr* [1817] M & S 121, where a tenant who had failed to pay his rent asserted that by reason of a proviso re-entry his lease was at an end. Lord Ellenborough said "... this

provision ... would be contrary to an universal principle of law, that a party shall never take advantage of his own wrong ..." In *New Zealand Shipping Co. v. Societe des Ateliers et Chantiers de France* [1919] AC 1, Lord Atkins said: "But if the stipulation be that the contract shall be void on the happening of an event which one party or other of them can by his own act or omission bring about, then the party, who by his act or ommission brings that event about, cannot be permitted either to insist upon the stipulation himself or to compel the other party who is blameless, to insist upon it, because to permit the blameable party to do either would be to permit him to take advantage of his own wrong, in the one case directly, and in the other case in a roundabout way, but either way putting an end to the contract") such that the defendants cannot rely on their own failure to apply for formal consent as bringing the agreement to an end.

The just intent of the parties that appears from the construction of the said agreement was that the plaintiffs would buy and the defendants would sell the said land free of all encumbrances without vacant possession if the said land is released from acquisition, now interposing cl. 5, within two years from the date of execution of the said agreement.

Clause 5 (reproduced earlier) stipulated that the agreement would be null and void "if for whatsoever reasons the Penang State Government refused to release the said property from the restrictions ... within two years from (8 January 1979)"

The ordinary dictionary meaning of "null and void" is invalid or not binding (*The Concise Oxford Dictionary of Current English* 9th edn.). "When used in a contract or statute, the words 'null and void' are often construed as meaning 'voidable'; it also means that which binds one or is capable of giving rise to any rights or obligations under any circumstances, or that which is of no effect" (*Black's Law Dictionary* 6th edn.).

Nevertheless, void or voidable, the intent of the parties was that the sale would come to an end if the land was not released from the intended acquisition by or before 8 January 1981, and cl. 5 was inserted, evidently from the tenor of the entire document, (i) to deliver the trustees from any proceedings by the plaintiffs to enforce sale and or to claim damages for breach if the trustees, that by compulsory acquisition, would have no title to pass, and, (ii) to allow the plaintiffs to call off the purchase, thereby not having to lose the deposit, if the land was acquired.

It is common ground, in any event beyond dispute, that the intended acquisition of the whole of the said land (GN 103/74 dated 25 April 1979) was withdrawn (GN 887/84) in 1984. Undoubtedly, the State "had not given up" – surely the

ordinary meaning, given the factual background, of the words "refused to release" – its intent to acquire the said land until 1984. Then, could it be argued, and cl. 5 clearly stipulated, "if for whatsoever reasons the Penang State Government refused to release the said property from the restrictions imposed under the Land Acquisition Act 1960 to the Estate of Ong Joo Sun, deceased within two (2) years from the date hereof, this agreement, notwithstanding clause one (1) to three (3) aforesaid, shall be null and void", that the agreement, on 8 January 1981, was not "null and void" as the agreement had expressly stipulated?

Mr. Abraham and Mr. Ong had no doubt the said agreement had come to an end, on 8 January 1981. Indeed, since the State had not given up its intention to acquire the said land by 8 January 1981, the said agreement would have "ended", but only on 8 January 1981, and then if the plaintiffs had not requested, by their letter of 8 December 1980, that is, whilst there was a binding agreement which neither could disavow, the completion of the sale "notwithstanding the acquisition".

As said, the just intent of the parties, from the construction of the said agreement, was that the plaintiffs would buy and the defendants would sell the said land free of all encumbrances. The vendors would be receiving RM1.60 p.s.f. whilst the purchasers would be receiving the said land free of encumbrances. It is axiomatic, in the context of landed interests, that an encumbrance subsists to the diminution of its value. Therefore, the contractual term that the land be free of encumbrances and cl. 3(a), under circumstances where the plaintiffs would be giving full value, was inserted entirely for the benefit of the plaintiffs, in that the plaintiffs giving full value would also be receiving full value.

To recollect, Mr. Sethu submitted, (i) the plaintiffs' letter of 8 December 1980 was a waiver of cl. 5 of the agreement, (ii) the right of the Estate was to RM1.60 p.s.f. would not be affected, (iii) the plaintiffs were taking the risk of the intended acquisition and it is irrelevant whether the plaintiffs would suffer loss. Now, whether that letter of 8 December 1980 was a waiver indeed of cl. 5 and not of some other clause could be debated. However, it was beyond debate, probably explaining why it was not argued otherwise, that the plaintiffs by that letter of 8 December 1980 were calling for a conveyance subject to encumbrance (the acquisition proceedings) and binding themselves thereby to accept an encumbered title without affecting however the interests of the Estate. Could that conveyance subject to acquisition be refused? Mr. Sethu extended the following three authorities.

In *Sandra Investments Proprietary Limited v. Booth* [1983] 153 CLR 153 (HCA), the facts were as follows. A contract for the sale of land was "subject to and conditional upon" municipal approval of a plan of subdivision on terms and conditions satisfactory in all respects to the purchaser within six months from the date of the contract. If the approval was not obtained the purchaser had the "option" of cancelling the contract. The purchaser was not able to obtain the necessary approval. At the expiration of the six months it waived the condition and sued for specific performance of the contract. Reversing the decision of the Full Court of the Supreme Court of Queensland, the High Court of Australia held that if the purchaser did not choose to cancel the contract when it was unable to obtain approval of the plan, it was the plain implication of the condition (Per Gibbs CJ, Mason, Murphy and Brennan JJ. The condition was solely for the benefit of the purchaser and he was entitled to waive performance of it) that the vendor had no right to treat it as being at an end.

Likewise, in *Lancelot St. Elmo Balbosa v. Ayoub Ali* [1990] 1 WLR 914, a conditional contract was the subject of the appeal, from the Court of Appeal of Trinidad and Tobago to the Privy Council. By s. 8(1) of the Town and Country Planning Act 1960, permission was required for any development carried out after 1 August 1969; sub-s. (2) defined "development" as including the sub-division of any land, and s. 2(1) provided that "sub-division" meant "the division of any land other than buildings held under one ownership into two or more parts whether the sub-division is by conveyance, transfer, or partition, or for the purpose of sale, gift, lease or any other purpose ...." By a sale agreement after the appointed date, the vendor agreed to sell one of the buildings on his land and a parcel of land to the plaintiff. Clause 6 of the agreement provided that the sale should be subject to the obtaining from the relevant authority of all necessary approvals for the transfer. The vendor died but the defendant, who obtained letters of administration, was not successful in his application for outline permission to sub-divide the land. In an action by the plaintiff against the defendant, the learned judge ordered specific performance. The Court of Appeal upheld that decision. The Privy Council held that cl. 6 was a term of the agreement for the plaintiff's benefit which he could waive, not a condition precedent rendering the agreement unenforceable if permission was refused, and that by instituting the proceedings the plaintiff had waived any non-compliance with cl. 6 and was entitled to an order for specific performance.

In *Graham v. Pitkin* [1992] 64 P & C R 522, the appellant vendor and her husband agreed to sell a property to the respondent. Completion was to take place on or before 31 May 1978, "subject to the purchaser obtaining a mortgage from VMBS (the Victoria Mutual Building Society) of $19,000." The vendor's husband died. It was not until September 1980 that the solicitor for

both parties wrote to the VMBS saying that he was ready to register the husband's death on the title and the purchaser executed a transfer. The VMBS discovered breaches of restrictive covenants registered against the property and declined to proceed until the breaches were condoned or rectified. The purchaser was informed that the vendor was not prepared to rectify the breaches and was invited to proceed or treat the contract as rescinded. Having not heard from the purchaser, the vendor rescinded the contract. Reckford J granted an order for specific performance to the purchaser which was upheld by the Court of Appeal of Jamaica. The Privy Council held that the condition that the purchaser obtain a mortgage from the VMBS solely benefitted the purchaser and could be waived by her. "It did not matter to the vendor where the money came from" (per Lord Templeman).

Indeed, "any one may, at his pleasure, *quilibet potest renunciare juri pro se introducto,* renounce the benefit of a stipulation or other right introduced entirely in his own favour ... A defendant may, as a rule, decline to avail himself of a defence which would at law be a valid and sufficient answer. A man may renounce a claim which might have been substantiated, or release a debt which might have been recovered by ordinary legal process, or he may, by his express contract or stipulation, exclude some more extensive right which the law would otherwise have conferred upon him. In all these cases, the rule holds, *omnes licentiam habere his quae pro se induta sunt renunciare,* every man may renounce a benefit or waive a privilege which the law has conferred upon him. For instance, whoever contracts to purchase an estate in fee simple without any stipulation to vary the general right, is entitled to call for a conveyance of the fee, and to have a good title to the legal estate made out. But a man may generally by express stipulation, or even by consent testified by acquiescence or otherwise, bind himself to accept a title merely equitable or a title subject to some encumbrance; and whatever defect there may be, which is covered by the stipulation, must be disregarded by the conveyancer to whom the abstract of title is submitted, as not affording a valid ground of objection ... But this rule is subject to the qualification that a man cannot renounce that which has been introduced for the benefit of another party" (see *Broom's Legal Maxims* 10th edn. for the full discussion and the legal authorities) (emphasis added).

Therefore, despite the absence of a stipulation in the agreement to vary the right, the plaintiffs at their pleasure may renounce (and so it was by an express stipulation – letter dated 8 December 1980) the "fee simple" (the said land free of encumbrances) for the "fee" subject to acquisition; the 1st and 2nd defendants had no valid ground of objection, since the purchase price would be paid in full, to the conveyance of the said land subject to acquisition.

"Waiver was not pleaded", Mr. Abraham said in his reply. "In any event", he said, "waiver does not apply because it can only apply if cl. 5 was for the exclusive benefit (of the plaintiffs) and not when it (was) an essential condition of the agreement." Mr. Ong replied that the terms of the agreement would not permit a waiver. "Reading cls. 3 and 5 conjunctively, the parties agreed to the outcome in the event that acquisition was not withdrawn, he added.

With respect, those arguments are not reasonable. The plaintiffs pleaded, in para 14 of the statement of claim, that they required of the 1st and 2nd defendants to complete the sale, and they proved they had renounced, in that sense "waived", the contractual term on the said land being free of encumbrances. The fee simple renounced but the conveyance subject to acquisition refused, the real issue is whether the 1st and 2nd defendants' refusal to complete the sale, even whilst there was a binding agreement that neither could disavow, could be defended. That "waiver" was not specifically pleaded could not be an issue, as notice was given, both in the statement of claim and in the bundles, that the plaintiffs would be adducing evidence that they required the 1st and 2nd defendants to complete the sale. It is not said at all by the court that cl. 5 was exclusively for the benefit of the plaintiffs; but the agreed term that the said land would be free of encumbrances and cl. 3(a) were for the exclusive benefit of the plaintiffs, and the plaintiffs had a right, in the absence of an express prohibition, to "waive" the condition on the withdrawal of the acquisition proceedings. The agreement would only have ended, on 8 January 1981, if the plaintiffs had not called for the conveyance subject to acquisition.

"The canons of construction are no more than pointers to discovering the presumed intention of the parties to a written contract. They are not to be slavishly applied, and where they point in different directions the court must select those which will produce a reasonable and just result" (*The Interpretation of Contracts* by Lewison, p. 123). "The fact that a particular construction leads to a very unreasonable result is a relevant consideration. The more unreasonable the result the more unlikely it is that the parties can have intended it, and if they do intend it the more necessary it is that they shall make that intention abundantly clear" *(Schuler (L) A.G. v. Wickman Machine Tool Sales Ltd. (supra)* per Lord Reid).

In the instant case, it is a just and reasonable result that the 1st and 2nd defendants could not refuse the conveyance subject to acquisition. They would be paid in full and it did not matter to them whether the plaintiffs would suffer loss. The rival construction, if it is so, that the conveyance subject to acquisition could be refused, even if the purchase price would be paid in full, would not be a reasonable result. Neither would it be a construction upholding the transaction.

The 1st and 2nd defendant refused the conveyance subject to acquisition that was not restrained by the notice of intended acquisition. For the reasons given herein, that refusal must be put right. The agreement provided for specific performance.

It is hereby ordered that the 1st and 2nd defendants do specifically perform the said agreement dated 8 January 1979, in that (i) the plaintiffs are to pay the balance sum (less RM361,114.80) into court on or before 8 October 1997, (ii) the 1st and 2nd defendants are to deliver the documents of title to lots 2347, 2348, 2349 & 2350 on or before 8 October 1997, (iii) the 1st and 2nd defendants, within seven days from the date of payment of the balance sum (less RM361,114.80), are to execute (and or procure the execution) a good and registrable transfer of the aforesaid four lots free of all encumbrances in favour of the plaintiffs, and deliver the said memorandum of transfer duly executed to the plaintiffs' solicitors. In the event of the 1st and 2nd defendants failing to comply with directions (ii) and or (iii), it is ordered (iv) that the Registrar of Titles do cancel the present document of titles to the said four lots and issue four replacement titles to be collected by the plaintiffs and that (v) the learned Senior Assistant Registrar do execute the aforesaid memorandum of transfer in favour of the plaintiffs. It is also ordered that the defendants pay the plaintiffs the costs of this action.

All parties agreed to defer the issue of damages until after the issue of liability has been settled. Mr. Abraham indicated that the 1st and 2nd defendants would be appealing against the order of specific performance. Accordingly, and by consent, it is ordered that the issue of damages stand deferred until after the outcome of the intended appeal.

Reported by Anne Soh